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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., et al.,
Petitioners,

vs.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, et al.,
Respondents.

Motion of Sierra Club for leave to file brief as amicus curiae and Brief of the Sierra Club Amicus Curiae

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Motion of Sierra Club for leave to file brief as amicus curiae

The Sierra Club, a California non-profit corporation, respectfully moves this Court for leave to file a brief in this case as *amicus curiae*. The consent of the attorneys for the petitioners herein has been obtained, and the Solicitor General of the United States has consented, but the attorney for respondent American National Bank and Trust Company has refused to consent to the filing of a brief by Sierra Club as *amicus curiae*.

The applicant, the Sierra Club, has an interest in this case in that it is a party to cases pending in several courts in the United States in which the question of "standing" is involved. The issue of "standing" is involved in this case,

in that the decision of the Court of Appeals for the Eighth Circuit was grounded basically upon the proposition that petitioners herein lacked "standing". *Association of Data Processing Service Organizations, Inc. v. Camp,* 406 F2d 837 (8th Cir. 1969).

The case at bar is a "competition" case (a subclass of "standing" cases in which the plaintiff is objecting to governmental action which creates the possibility of enhanced competition). Applicant believes that the case will be briefed and argued substantially in terms of the body of law dealing with "competition" cases on "standing", and that the much broader implications of the "standing" doctrine in other cases, such as in those in which the Sierra Club is a party, will be not adequately briefed or argued.

If the principal argument intended to be advanced by the Sierra Club is approved by this Court, then the decision of the lower court in this case must be reversed. If other points to be urged by the Sierra Club are approved by this Court, then its decision in this case will be carefully limited to the factual situation presented, even if the judgment is affirmed.

DATED: August 22, 1969

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Brief of the Sierra Club Amicus Curiae

I

INTEREST OF THE SIERRA CLUB

The Sierra Club is interested in the "standing" issue in this case. It urges reversal of the Court of Appeals' decision that the Association of Data Processing Service Organizations (hereinafter "ADAPSO") lacked standing to challenge the rulings of the Comptroller of the Currency here in issue.

The Sierra Club is presently engaged in litigation against governmental officials in which its "standing" has been challenged.[1]

Although the lower courts have recently decided in favor of the Sierra Club's standing in the cases which it is litigating, the decision of the Eighth Circuit in this case has been cited for the proposition that the Sierra Club lacks such standing. The Eighth Circuit's very narrow construction, in the case at bar, of § 10 of the Administrative Procedure Act (5 USC § 702) would greatly restrict the "standing" of potential plaintiffs seeking to challenge administrative action. Accordingly, the Sierra Club urges that the Eighth Circuit's decision in this case is either:

(1) Erroneous, or

(2) Should be strictly limited to the facts of the case.

The Sierra Club is a non-profit California corporation headquartered in San Francisco with a national membership of about 78,000. For many years the Sierra Club, by its activities and conduct, has exhibited a special interest in conservation, regularly serving as a responsible representative of its members and other persons similarly interested. One of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada mountains and other similar areas of natural beauty throughout America which are threatened by damage or destruction by the growth of population and the expansion of commercial and industrial enterprise into ever more remote geographical locations.

The societal values which the Sierra Club has championed have, to a significant degree, been recognized by

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1. *Sierra Club v. Hickel*, U.S.D.C. N.D. Calif. No. 51464, ("Mineral King" case); *Citizens Committee v. Volpe*, U.S.D.C. S.D. N.Y. Nos. 69 Civ. 295 and 69 Civ. 305 ("Hudson River Expressway" case).

Congress and embodied in statutes creating National Parks, National Seashores, governing the use of National Forests, National Game Refuges, and navigable waters of the United States, and controlling the construction of projects such as roads, pipelines, power lines, dikes, causeways and dams.

Since the parties to the case at bar are interested in the ramifications of a purely commercial competitive situation, the Sierra Club feared that the elements of the complicated question of "standing" would not be fully briefed or argued by the parties. To provide a broader perspective on the "standing" question, particularly as it relates to the type of litigation in which the Sierra Club is engaged, the Sierra Club appears herein as *amicus curiae.*

II

ARGUMENT

A. Introduction.

The concept of "standing" to seek judicial review of administrative action is both large and complex, as befits a doctrine which must deal with the enormous range and scope of governmental action in a complicated society. Congress has necessarily entrusted the execution of its mandates to the enormous and far-flung bureaucracy of the executive branch of government, and to agencies not subject to direct control by the executive. The activities of federal officers affect many aspects of the lives of all Americans. Unless carefully examined in advance, a broadly stated rule of "standing" applicable to judicial review of all types of administrative actions could have serious untoward and unsuspected consequences.

Moreover, the question of "standing" necessarily involves the court in at least a minimal examination of the merits of the case. It must, as a minimum, know who the plaintiff

is, who the defendant is, and the general nature of the defendant's activity of which the plaintiff complains. Having seen that much, the court may be subtly influenced in its decision on "standing" by its estimate of the probable likelihood of the plaintiff's success. In terms of judicial economy, it is certainly easier to throw the plaintiff out of court for lack of standing than to try the case and throw him out on the merits.

But that solution assumes that the challenged action was in fact proper. What of the case in which it was not?

Where a federal official has in fact acted in excess of his statutory authority, or contrary to it, there is only one effective remedy: A lawsuit. Since Congress has already expressed its will in the statute, and the officer has equally expressed his intention to disregard the will of Congress, the remedy (if there is to be one) must be in the courts.

Of course, the position of the judiciary is a delicate one. The Constitution does not contemplate the federal judiciary as the ultimate ruling body of the nation. Nevertheless, denial of "standing" in a plaintiff is only one (and probably the least satisfactory) method of preserving the appropriate balance between the three branches of government.

Indeed, in almost any controversy involving a suit against a federal official, there are a number of grounds for denying the plaintiff relief:

1. The plaintiff has no standing;
2. There is no "case or controversy";
3. The defendant has immunity;
4. The federal officer has acted properly, or at least not demonstrably improperly.

From the plaintiff's point of view, his challenge to unlawful action by a federal officer can founder on any of those shoals, and the result to him is the same—he loses.

However, it is substantially less satisfying to the plaintiff complaining of unlawful administrative action to be told that he may not sue for a procedural reason, than to be told that while he may sue, he may not have relief because the challenged activities of the federal officer were in fact proper (or at least within the scope of his discretion). Although, in the latter case, the plaintiff may not like the substantive law's result, he at least knows that the law has been obeyed.

The purpose of the law in a democracy, after all, is to satisfy the people of the nation that it is possible to get justice within the framework of an ordered liberty.

To deny relief to a plaintiff attempting to challenge administrative action on the grounds that he lacks "standing" may leave him to watch in helpless rage while the errant federal official blithely sets at naught the will of the people as expressed through Congress.

In short, the price that must be paid for a narrow interpretation of "standing" is the frank acknowledgement that many types of lawless administrative action nonetheless remain beyond the reach of justice.

Thus, the first and probably most important question in any "standing" case is whether a denial of standing will have the effect of making an administrator's action unreviewable even though Congress has never expressly called for such a result, but has, to the contrary, expressed the general rule in favor of judicial review through the Administrative Procedure Act. We believe that, absent clear evidence of intent to make administrative action unreviewable, the Administrative Procedure Act should be construed to confer "standing" upon persons "adversely affected" or "aggrieved" by particular administrative action in the broadest sense of those terms. The principle

evidenced by *Flast v. Cohen,* 392 U.S. 83 (1968), *Hardin v. Kentucky Utilities Co.,* 390 U.S. 1 (1968) and *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967) is clearly correct and should be continued.

B. There is a strong policy of the law favoring judicial review.

In *Flast v. Cohen,* 392 U.S. 83 (1968) this Court broke through the "impenetrable barrier" of *Frothingham v. Mellon,* 262 U.S. 447 (1923) which for forty-five years had precluded suits by plaintiffs whose "case or controversy" was an abiding conviction of the unlawfulness of official action in spending money and whose sole interest in the outcome was some infinitesimal, unmeasurable interest as a taxpayer.

Mr. Justice Douglas, in his concurring opinion, noted that the restraint upon standing imposed by *Frothingham* has been supplanted in recent years by a different type of restraint—a refusal to pass upon the wisdom or reasonableness of legislation under the rubric of "substantive due process".

The same rationale applies here. It may be that the plaintiff should not prevail. The reviewing court may express its restraint in the scope of its review of the merits of the case. But the plaintiff should not be turned away if he has any interest adversely affected by the challenged administrative action.

The Administrative Procedure Act allows review to one "adversely affected or aggrieved . . . within the meaning of a relevant statute." (5 U.S.C. § 702.) That provision, in effect, puts the "adversely affected or aggrieved" concept, which appears directly in many statutes, into all statutes governing administrative action. The question is, what is meant by "adversely affected or aggrieved"?

In the cases involving statutes with self-contained review provisions for persons adversely affected or aggrieved, the

classes of plaintiffs with "standing" have (properly) been drawn liberally. See *Joseph v. FCC,* 404 F2d 207 (D.C. Cir. 1968); *United Church of Christ v. FCC,* 359 F2d 994 (D.C. Cir. 1966); *Scenic Hudson Preservation Conference v. FPC,* 354 F2d 608 (2d Cir. 1965); *State of Washington Dept. of Game v. FPC,* 207 F2d 391, 395 f.n. 11 (9th Cir. 1953); *Associated Industries v. Ickes,* 134 F2d 694, 705-707 (2d Cir. 1943), vacated as moot 320 U.S. 707 (1943).

The Administrative Procedure Act should be construed as liberally as the similar language in the statutes with self-contained administrative review provisions. A number of courts have reached this result. See e.g. *Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F2d 920, 933 f.n. 26 (2d Cir. 1968); *Citizens Committee for the Hudson Valley v. Volpe,* ..... F.Supp. ..... (S.D. N.Y. 1969); *Powelton Civic Home Owners Assn. v. Dept. of HUD,* 284 F.Supp. 809, 827-828 (E.D. Pa. 1968); *Road Review League v. Boyd,* 270 F.Supp. 650, 659-661 (S.D. N.Y. 1967).

Indeed if the rule of standing is, as *Flast v. Cohen* suggests, a judicially-created rule of self-restraint, then there would appear to be no reason in proper cases why the mere willingness to undertake the expense and trouble of bringing the lawsuit should not evidence a sufficient level of "aggrievement" to support the plaintiff's standing. Cf. *United Church of Christ v. FCC,* 359 F2d 994, 1005 (D.C. Cir. 1966).

C. "Competitor" cases are special cases.

The particular danger inherent in this case—to the Sierra Club and many other potential plaintiffs—is that it is a "competitor" case. Competition is the life of trade, and, generally speaking, the law of the land. America's strong policy against restraints of trade makes cases such as the case at bar unattractive on the merits; ADAPSO is com-

plaining that its members will be faced with additional competition from national banks.

Since there are general policies of the law favoring both competition on the one hand and judicial review of administrative action on the other, a complicated metaphysics of "standing" has grown up in the "competitor" cases, revolving around concepts such as "lawful competition" and inquiries into the purpose of the legislation which commingle the standing issue with the merits of the case to be decided. (See e.g. *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968). (Cf. *Flast v. Cohen*, 392 U.S. 83, 100, f.n. 21 (1968).)

The problem arises in attempting to look beyond the *plaintiff* to the merits of the controversy. As *Flast v. Cohen* points out, "[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." (392 U.S. at 99.)

It may be that, on the merits, most competitors complaining of new competition created or permitted by government action have no case. If so, the deficiencies of their cases on the merits should not be confused with lack of "standing". The procedures for disposing of legally insufficient complaints *on the merits* through motion for summary judgment under Rule 56, Fed. R. Civ. P., or even for judgment on the pleadings under Rule 12(c), Fed. R. Civ. P. are readily available, and summary in nature. In short, no good reason appears why cases of this sort cannot be decided equally easily on the merits.

Where, as here, the plaintiff has an interest in the administrative action because of its obvious impact on his competitive position, that should end the inquiry, as far as "standing" is concerned.

D. Some administrative action is "Reversible", some "Irreversible"

If all opponents of an unlawful administrative action are denied "standing" in the courts, their only remedy is to try to change administrations through the ballot box. At best, this is a crude remedy.* At worst, it is no remedy at all, because some kinds of administrative action are like the proverbial scrambled egg—there is no way to unscramble them.

The case at bar presumably does not involve "irreversible" administrative action. Although the competition of national banks may hamper the growth of independent data processing service organizations it will not necessarily destroy them. There appears to be no good reason why, if national banks were ultimately required to withdraw from outside data processing activities, the service organizations would not immediately leap in and fill the gap.

By comparison, the kinds of administrative action which the Sierra Club has attacked in court typically involve projects of that sort which, once completed, have irreversibly altered the landscape in such a way that it cannot be restored for a very long time, if ever.

Where the unlawful administrative action will be irreversible, the ballot box is likely to offer no remedy at all, for by the time the administration changes, the damage is likely to be done.

The distinction between cases of "reversible" administrative action and action which is final, and for practical purposes irreversible, is an important distinction which should be borne in mind in any overall analysis of the law of "standing". If, by the nature of the problem, it is not

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*As Professor Jaffe observes, "Formal majorities register judgments occasionally, and then as a rule not on specific issues but on total performance." (Standing to Secure Judicial Review: Public Actions 74 Harv. L. Rev. at 1286-1287)

susceptible of solution by the political process, the courts should not shrink from their responsibilities. Cf. *Baker v. Carr,* 369 U.S. 186 (1962).

E. The "Intended Beneficiary" approach to standing is defective.

The lower court decisions involving the Comptroller's power to put national banks into other businesses have given rise to conflicting decisions on standing. In *Saxon v. Georgia Ass'n of Independent Ins. Agents, Inc.* 399 F2d 1010 (5th Cir. 1968) the Fifth Circuit upheld standing of the insurance agents. In *Arnold Tours, Inc. v. Camp,* 408 F2d 1147 (1st Cir. 1969) the First Circuit ruled against the travel service on standing, but in the same opinion (dealing with the consolidated case of *Wingate Corp. v. Industrial National Bank)* the First Circuit refused to deny standing to a data processor, in direct conflict with the case at bar. (*Ibid,* at 1153) In *Camp v. Investment Company Institute,* ..... F2d ..... (D.C. Cir. 1969), a majority of the District of Columbia Circuit had "reservations about standing" but resolved them in favor of the Investment Company Institute (and then ruled against it on the merits).

Superficially, it might seem appropriate to distinguish the "competitor" cases between those in which the statute in question was intended to shelter the plaintiff from competition and those in which the incidental and perhaps unintended effect was to shelter the plaintiff from competition. But why should that be so? Is it because the incidental beneficiary of the statute has no legal "right" or is it because the "direct" beneficiary is thought to be a more appropriate plaintiff? What if the "direct" beneficiary doesn't want to bring suit? (Cf. *Associated Industries v. Ickes,* 134 F2d 694, (2d Cir. 1943). What if there is no "direct" beneficiary except the public at large?

Suppose, for example, that the purpose of all of the limitations upon the businesses in which national banks may engage is to prevent bank failures. The narrower purpose of preventing bank failures would be to protect national bank depositors (a very large class). The overall purpose would be to protect the general public (an even larger class) from the adverse consequences to the entire economy which might be expected to follow any large-scale loss of confidence in the stability of national banks.

So, who should the plaintiff be if the Comptroller of the Currency unlawfully permits national banks to sell insurance, run travel agencies, operate mutual funds, and offer data processing services? It is hard to visualize any person or group willing or able to test the Comptroller's action except someone already in those businesses who fears the added competition.

Petitioners serve the function of "private attorneys general" in testing the Comptroller's actions here, even though their *motive* may be the commercial objective of eliminating unwanted competition. Although a commercial motive may not give petitioners *greater* standing than those with private, or personal, or in any event non-commercial motives, it is hard to see why petitioners' commercial motivation should give them *less* claim to standing. Cf. *Flast v. Cohen,* 392 U.S. 83 (1968); *Baker v. Carr,* 369 U.S. 186 (1962); *United Church of Christ v. FCC,* 359 F2d 994 (D.C. Cir. 1966); *Scenic Hudson Preservation Conference v. FPC,* 354 F2d 608 (2d Cir. 1965); *Powelton Civic Home Assn. v. HUD,* 284 F.Supp. 809 (E.D. Pa. 1968); *Road Review League v. Boyd,* 270 F.Supp. 650 (S.D.N.Y. 1967).

F. A broad rule of "Standing" will not flood the courts.

A broad conception of "standing" for responsible groups representing important social interests will not create

massive litigation. There is no money in it. Only groups of citizens deeply concerned about the legality of particular administrative action will tax themselves to finance the expensive quest for judicial relief.

Even the complete elimination of a "standing" barrier would not swamp the courts with litigation if the experience with taxpayers' suits is any guide. Professor Davis documents the point ("opening the judicial doors to taxpayers' suits does not cause floods; it hardly causes trickles") in his provocative article "Standing: Taxpayers and Others", 35 U. Chi. L. Rev. 601, 634 (1968).

Since the challenge made to an unlawful administrative act is by its nature "a matter of principle", a determination that a government official is acting in excess of statutory authority will ordinarily result in relief for all persons adversely affected (whether or not they are formal parties to the suit). In many, if not most, instances, the class of persons adversely affected can be expected to join together in a single suit or simply to ride the legal coattails of any responsible champion of their interests.

Moreover, the problems of floods of litigation have been greatly ameliorated in recent years by the procedural devices which permit the use of class suits, consolidation of cases and multi-district transfers to keep even the most massive litigation under tight judicial control. (Fed. R. Civ. P. Rules 23, 42; 28 U.S.C. § 1407.)

III

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be reversed and the case remanded for decision on the merits. Alternatively, the Court's holding should be so limited as not to suggest an inappropriately

narrow rule of "standing" in those cases in which the public interest rather than a purely commercial private interest is the motivating factor for the litigation.

DATED: August 22, 1969

Respectfully submitted,

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